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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 304

TRADEWAYS INCORPORATED,

Petitioner,

against

CHRYSLER CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: June 28, 1965.

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Tradeways Incorporated, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered March 1, 1965, which (1) affirmed a judgment for respondent with respect to its counterclaim and (2) reversed a judgment for breach of contract damages entered in favor of petitioner upon a jury's verdict, with instructions to dismiss the complaint. Petition for rehearing was thereafter duly made, which petition was denied on March 30, 1965.

Opinions Below

The opinion of the Court of Appeals is reported at 342 F. 2d 350-356 (1965) and is annexed hereto as Appendix "A".* The opinions of the District Court for the

* References hereinafter to the "Appendix" are to the appendix of this petition; parenthetical numbers prefaced by the letter "R" refer to pages of the certified record; parenthetical numbers prefaced by the letters "PA" and "DA" refer, respectively, to petitioner's and respondent's appendix record below, nine copies of which have been filed in accordance with paragraph 4 of Rule 21 of this Court.

Southern District of New York were not officially reported. They were included in respondent's appendix below (DA 5-9) and are herein annexed as Appendix "B". The judgment of the Court of Appeals is annexed hereto as Appendix "C", while the orders of that court denying the petition for rehearing is annexed as Appendix "D".

Jurisdiction

The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. § 1254(1) and 62 Stat. 961 as amended, 28 U.S.C. § 2101(c).

Questions Presented

The questions presented are:

1. Did the Court of Appeals deprive petitioner of its constitutional right under the Seventh Amendment to have the jury determine disputed fact questions in this breach of contract action when, after examining and weighing conflicting evidence, it reversed the District Court's judgment and directed the dismissal of the complaint?

2. Did the Court of Appeals err and deprive petitioner of due process, when it reversed a judgment entered on a jury's verdict in petitioner's favor and directed dismissal of the complaint, upon the ground that the Chief Judge of the District Court had abused his discretion in not granting respondent's motion to dismiss the complaint for failure to prosecute, where that motion was first made on the eve of trial and after petitioner had twice asked the Chief Judge for a trial preference?

Constitutional Provisions Involved

The constitutional provisions involved are the Seventh and Fifth Amendments.

Statement of the Case

Petitioner, based upon diverse citizenship of the parties, sued respondent in the District Court for the Southern District of New York, claiming breach of contract.

It was never disputed that the parties entered into *an* agreement. However, while petitioner sued for breach of an *oral* contract, respondent asserted a *written* contract by way of defense.

Before submission of the contract issues to the jury, petitioner moved to amend its pleadings so as to allow recovery under either an oral or a written contract. That motion was denied by the trial court, despite that issue having been raised by both parties in the pre-trial order (DA 275-277).

Following an 8-day trial to a jury, before Murphy, J. in the District Court for the Southern District of New York, the jury returned a verdict in favor of petitioner awarding it damages of $108,000 for respondent's breach of the oral contract. Respondent was given judgment by the court on its counterclaim in the amount of $12,480 (Appendix "B").

The trial court submitted the following questions to the jury:

(1) Whether or not an oral contract was entered into between the parties in the latter part of 1955 and what its terms were;

(2) Whether or not the oral contract was breached by the defendant; and

(3) The amount of damages which would fairly and justly compensate petitioner by reason of such breach, if any (DA 10-12; 275-6).

The jury, after hearing oral testimony on the circumstances surrounding the making of the alleged oral con-

tract and after examining several writings—including all those relied on by respondent as comprising the written contract—returned the following verdict:

> "On point 1, we find there was an oral contract.
>
> 2. There was a breach of the oral contract by the defendant.
>
> 3. We award the plaintiff damage to the extent of $108,000."

On the issue of the making of the contract, the court charged the jury (DA 11-12):

> "It is the plaintiff's claim, as I told you, that an oral agreement was entered into between it and the defendant in the latter part of 1955.
>
> The defendant's position is that there was no oral agreement either at that time or any other time.
>
> Defendant says that the only agreement that was made between the parties was the one represented by a written purchase order that was issued by the defendant corporation in March—March 23, 1956—and actually received by the plaintiff the following May 7th.
>
> That order incorporates by reference plaintiff's letter of December 23, 1955 and Exhibit 11."
>
> • • •
>
> "It is the plaintiff's claim here that after a series of transactions, negotiations, communications and dealings there came a time late in 1955 when Tradeways, Inc. entered into an agreement with Chrysler Corporation by the terms of which the plaintiff would prepare a sales power program for the defendant's DeSoto Division, and the defendant, in turn, would use its best efforts to foster that program and through its district managers induce its dealers to subscribe

or register at a cost to the dealers of $15 a month for 12 months (DA 15)."

On the issue of what the respective contract obligations were, the court charged:

> "The plaintiff also claims that the oral contract was breached by the defendant * * * and that this was occasioned principally because it did not have its district managers personally attempt to persuade the dealers to sign up, and that this, in turn, was caused by the reorganization of the company in which the Chrysler Motor Company was formed and the chain of command was materially affected (DA 13-14).
>
> * * *
>
> It is the defendant's contention that not only was there no oral contract, but even assuming that there was, the defendant honestly and conscientiously and in good faith tried its level best to sell the plaintiff's program to the dealers and at no time did it relax in its efforts and at no time did it breach any promise that it made.
>
> In fact, it claims that under the purchase order, which they say is the only agreement existing between the parties, that it was amended by mutual consent and there was no obligation on their part that the district managers thereafter do anything (DA 16-17)."

Following the return of the jury's verdict, which resolved the factual disputes in petitioner's favor, the district court ordered entry of judgment on the verdict, giving its reasons in two written opinions (DA 5-9).

The Court of Appeals, in reversing the district court, rejected the jury's verdict and ordered the complaint dismissed. It did so on the ground that the Chief Judge of the Southern District had abused his discretion in denying respondent's motion— made on the very eve of trial—

to dismiss for failure to prosecute. However, because Judge Waterman dissented on this point, and because the parties had argued the contract issues in their briefs, the Court of Appeals found it "desirable to discuss" the contract issues in its opinion.

In thus discussing the contract issues, the Court of Appeals reexamined the testimony and exhibits upon which the jury's determination was based, concluded that no oral contract had been made, and said that "Permitting the jury to determine whether the parties had entered into an oral contract was an error so serious as to compel reversal." Whereupon the Court directed verdict for the respondent and ordered the complaint dismissed. In addition, the Court of Appeals held that proof of the oral contract was barred by the statute of frauds (Appendix "A").

Reasons for Granting Writ

Certiorari should be granted in this case because the decision of the Court of Appeals is squarely in conflict with the Seventh Amendment prohibiting the re-examination and weighing of disputed fact questions already determined by the jury. It is in conflict with controlling decisions of this Court. And it is based upon a fundamental misconception and misapprehension of what that court termed "the gravamen of plaintiff's case".

The Court of Appeals deprived petitioner of its fundamental rights to a jury trial and due process when it

(a) re-examined and weighed sharply disputed fact questions;

(b) interfered with the exercise of sound judicial discretion by the Chief Judge and the trial judge; and

(c) held the Statute of Frauds a bar to petitioner's recovery, dispite a memorandum in writing and peti-

tioner's motion to have both the issue of the written and the oral contract submitted to the jury.

The decision of the Court of Appeals relegates the constitutionally guaranteed civil right and safeguard of the Seventh Amendment to a hollow, historical declaration. It represents yet another example of encroachment on the jury's constitutional functions and apparent hostility towards this fundamental guarantee of the Seventh Amendment. See: *Galloway* v. *U. S.*, 319 U. S. 372, 396-411 (1943); *Beacon Theatres* v. *Westover*, 359 U. S. 500 at 506 n.18 (1959).

I

Reversal is required as a means of enforcing the constitutional civil right and safeguard of the Seventh Amendment.

Having long emphasized the importance of the jury trial, this Court has been a jealous guardian against every encroachment upon this constitutional right "so justly dear to the American people.", *Parsons* v. *Bedford*, 3 Pet. (U. S.) 433, 445 (1830), *Beacon Theatres* v. *Westover*, 359 U. S. 500, 506 (1959).

By virtue of the Seventh Amendment, neither this Court "nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them", and thus has become fashioned "the federal policy favoring jury decisions of disputed fact questions.", *Atlantic & Gulf Stevedores* v. *Ellerman, Lines, Ltd.*, 369 U. S. 355, 358-9 (1962).

"It is a question of fact", as Professor Corbin holds, "that may properly be left to the jury whether there was a contract of any kind and what were its terms. The jury may find that there was a written integration . . . But the jury may find, instead, that there was no contract

at all, or that there was a contract that was partly in writing and partly oral.", Corbin on Contracts, 1951 Ed. Sec. 588 at pages 526-7. And where, as here, a contract is "partly in writing and partly oral, it is usually said that the terms, if disputed, are to be tried by the jury as a question of fact", Wigmore on Evidence, 3rd Ed. 1940, Vol. 9, Sec. 2556, at page 524.

In *Dairy Queen* v. *Wood,* 369 U. S. 469 (1961), where petitioner by way of defense to an action alleged an *oral* contract, while respondent alleged a *written* contract, this Court said at page 479:

> "Such a defense goes to the question of just what, under the law, the contract between the respondent and petitioner is and, in an action to collect a debt for breach of contract between these parties, *petitioner has a right to have the jury determine* not only whether the contract has been breached and the extent of the damages if any but also *just what the contract is.*" (Emphasis added.)

In the case at bar, the jury had before it all of the evidence, parol and in writing, bearing upon the issue of whether the conceded contract was oral or written. The terms were in dispute and the trial judge, in submitting the case to the jury, stated the respective "contentions of the parties and summarized the evidence with complete fairness.", 342 F. 2d at 354. Accordingly, we submit, the findings of fact made by the jury could not properly be reexamined and redetermined by the Court of Appeals, especially since the jury had before it *all* of the evidence bearing upon the oral as well as the written contract.

II

Dismissal of the action for lack of prosecution has no sound basis in law, in fact, or in justice and, under the circumstances, amounts to a denial of due process.

Preliminary to any consideration whatever of the case on its merits, the Court of Appeals held that Chief Judge Ryan abused his discretion when, on the eve of trial and after the action had been pending for five years, he denied respondent's eve-of-trial motion to dismiss for failure to diligently prosecute. No reference is made in the court's opinion to *respondent's* failure to answer the amended complaint until April, 1962, nor to its *respondent's* non-readiness for trial on three occasions, nor to illness of petitioner's counsel (Petition for Rehearing, pp. 2-3).

In *Delno* v. *Market St. Ry. Co.*, 124 F. 2d 965 (9th Cir., 1942), the court in defining abuse of discretion said at page 967:

> "Discretion is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only *where no reasonable man would take the view adopted by the trial court.* If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

Here, in his dissenting remarks on the point, Judge Waterman took the view adopted by Chief Judge Ryan, pointing out that the four cases relied on by his brethren are affirmances of dismissals by the district judges and none is a reversal of failure to dismiss. See also: *Link* v. *Wabash Railroad Co.*, 370 U. S. 627 (1962), a 4-3 decision in which this Court also *affirmed* the district judge's discretionary dismissal.

As the Court of Appeals based its reversal primarily upon the ground of Chief Judge Ryan's alleged abuse of discretion, we respectfully submit, petitioner's rights under the due process clause of the Constitution as well as under the Seventh Amendment have been violated.

III

The statute of frauds is no impediment to petitioner's recovery because respondent's disputed contract obligation is contained in the written contract upon which it relies.

The essence of the agreement between the parties was that petitioner, at its own expense, was to create and produce a sales training and development program—the DeSoto Sales Power Program—for the purpose of training DeSoto salesmen and promote the sales of DeSoto automobiles. It was to derive its sole compensation from subscription revenues to be paid by the individual subscribing DeSoto dealers. These subscriptions were to be obtained by the respondent, through its DeSoto district managers' personal solicitation of subscriptions from the dealers in interviews with each dealer. Petitioner had no opportunity to promote the program and obtain subscriptions on its own behalf, for it was undisputed that petitioner was forbidden any direct contact with the dealers.

As the trial court charged the jury: "It is the plaintiff's claim here that . . . the defendant, in turn, would use its best efforts to foster that program and *through its district managers* induce its dealers to subscribe or register at a cost to the dealers of $15 a month for 12 months.", (DA 11); that plaintiff claimed the defendant "failed to carry out in good faith its promise to cause its dealers to subscribe and that this was occasioned *principally because it did not have its district managers personally attempt to persuade the dealers to sign up*" (DA 13).

Petitioner's entire case, then, was predicated upon respondent's obligation to have its district managers obtain the dealer subscriptions. It was not, as the Court of Appeals states, "predicated on the theory . . . of the 'best efforts' requirement in the oral contract" (342 F. 2d at 352).

Under the written contract, respondent's obligation was to have its district managers "show convincingly the direct value of the program to each dealer" and to take "subscriptions" (DA 295, Ex. 11). Accordingly, the statute of frauds is satisfied by a memorandum in writing. See: Petition for Rehearing in Court of Appeals, pages 4-9.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 28, 1965.

APPENDIX "A"

TRADEWAYS INCORPORATED,

Plaintiff-Appellee-Appellant,

v.

CHRYSLER CORPORATION,

Defendant-Appellant-Appellee.

No. 169, Docket 28980.

United States Court of Appeals
Second Circuit.

Argued Nov. 13, 1964.

Decided March 1, 1965.

Thorolv T. Waaland, New York City, for plaintiff-appellee-appellant.

Robert Ehrenbard, New York City, (Francis S. Bensel, William S. Gennerich, Joseph E. Downs, and Kelley, Drye, Newhall, Maginnes & Warren, New York City, on the brief), for defendant-appellant.

Before LUMBARD, Chief Judge, SWAN and WATERMAN, Circuit Judges.

SWAN, Circuit Judge:

This is an action for breach of contract. Federal jurisdiction rests on diversity, plaintiff being a New York corporation with its principal place of business in New York and defendant, a corporation of Delaware, with its principal place of business in Michigan.

Appendix "A"

Plaintiff was engaged in the business of rendering sales promotional services to large corporations. Its complaint alleged that plaintiff entered into an express, bilateral, oral contract with defendant on November 22, 1955, and that defendant broke its contract obligations. Defendant counter-claimed for $12,480.12, the unpaid balance of a $15,000 advance made by defendant to plaintiff as part of the transaction. The case was tried before Judge Murphy and a jury in January 1964. The jury's verdict awarded plaintiff damages in the amount of $108,000. Judge Murphy directed entry of a judgment in favor of defendant on its counterclaim.

As a preliminary argument Chrysler asks us to dismiss the complaint on the ground that Tradeways failed to prosecute its case with proper dispatch. The original complaint was filed on October 29, 1958. Four amended complaints were submitted between January 3, 1959 and February 18, 1960. The case was dismissed twice for lack of prosecution during 1960 and 1961. Twice it was restored to the calendar with Chrysler's consent. On May 21, 1963, after the restoration of the case to the calendar and on the eve of trial, Tradeways moved for a stay in order to take the deposition of Nielsen, a former Chrysler vice-president, and this motion was granted. Nielsen had not been listed on the pre-trial order although he had been known to Tradeways for a considerable period of time. The deposition was taken on June 17, 1963. On November 1, 1963, plaintiff sought an order allowing it to continue taking Nielsen's deposition, an order which was in violation of the terms of an order issued on October 2, 1963 by Judge Noonan when he previously denied a motion to extend time. Judge Weinfeld denied the motion and suggested that a motion to dismiss for failure to prosecute might be in order. Defendant made that motion, but it was denied by Judge Ryan who noted in his order that the new trial date would be the fourth set for the case.

[1] In our opinion, it was an abuse of discretion for Judge Ryan not to grant this motion. The delays appear to be almost entirely the fault of Tradeways. Chrysler's leniency in twice consenting to the restoration of the case to the calendar after the dismissals of 1960 and 1961 should not count against it in determining whether the delay in later proceedings had become intolerable. The delay eventually worked to the prejudice of Chrysler, owing to the unexpected death in an airplane accident in May 1962, three and a half years after the start of this litigation, of Welch, Chrysler's Director of Promotions Programming, who directed Chrysler's performance of the written contract which its answer admitted making, and who could have given testimony valuable to Chrysler.

Shorter delays in prosecuting a case have frequently been held to justify dismissal. See, for examples, Messenger v. United States, 231 F.2d 328, 331 (2d Cir. 1956); Newport v. Revyuk, 303 F.2d 23, 26 (8th Cir. 1962); Agronofsky v. Pennsylvania Greyhound Lines, 248 F.2d 829, 830-831 (3d Cir. 1957); Refior v. Lansing Drop Forge Co., 6 Cir., 124 F.2d 440, 444, cert. denied, 316 U.S. 671, 62 S.Ct. 1047, 86 L.Ed. 1746 (1942).

My brother WATERMAN disagrees with the decision to dismiss the case on the ground of prejudicial delay in its prosecution. As his dissent would have to discuss the contract issues and both parties have argued them in their brief, it seems desirable to discuss such issues in this opinion.

Plaintiff's action was commenced October 29, 1958. It alleged the making of a bilateral oral contract with defendant on November 22, 1955. Defendant's answer denied that it entered into an oral contract but admitted that on or about March 23, 1956, plaintiff agreed to conduct a twelve-month sales training and development program to be paid for by DeSoto dealers at the rate of $15 per month, and to repay to defendant, at the rate of $1500 per month,

the sum of $15,000 advanced to plaintiff by defendant. The agreement was defendant's Purchase Order (defendant's Exhibit A).

The alleged oral agreement of November 22 was said to contain a promise by Chrysler that it would use its "best efforts" to obtain dealer subscriptions for the Tradeways program. The written agreement of March 23 contained no such requirement. Plaintiff's entire case is predicated on the theory that the breach of the "best efforts" requirement in the oral contract caused Tradeways to incur losses in conducting its program, for which Chrysler should be held liable. Thus the gravamen of plaintiff's case is the existence and contents of the alleged oral agreement of November 22.

In 1 Corbin on Contracts, § 22 (1963), it is stated that "The history of any contractual transaction is merely the narrative of a series of events," and that these events should be considered "in their chronological order, determining their legal operation one by one as they have occurred." In their briefs both plaintiff and defendant cite § 22 and each claims it has applied these principles to the series of events in the case at bar; but they arrive at completely contradictory results. In our discussion we shall also attempt to apply the principles stated by Professor Corbin.

In the spring of 1953 Robert E. Taylor was made vice-president of Tradeways in charge of new business and he continued in that capacity until April 1, 1956. On February 23, 1955, Mr. Taylor wrote the defendant "seeking to interest it in a sales training method known as the 'Case Cast' method, which Tradeways had previously developed and which was currently being used by American Motors Corporation." He testified to going to the defendant's offices in Detroit, Michigan, on March 29, 1955 where he demonstrated the Case Cast technique and presented a price sheet telling "how much we were paid for building these cases

for individual companies." His next contact with defendant was in April 1955 when he went to Detroit to call on American Motors and "stopped in at DeSoto." He saw Mr. Mix, an employee of the defendant, who asked Taylor to supply him with a case recording made for American Motors in which American Motors' name was deleted and the word DeSoto substituted so that the defendant's executives could listen to this recording and get an idea how it might apply to their own selling activities. Taylor agreed to do this. On October 11, 1955 Mr. Taylor went to Detroit and talked with Mr. Blount and Mr. Mahler, employees of the defendant, who wanted to know about the technique of the Case Cast training and about the other recommendations Taylor had made in the earlier meetings with other DeSoto executives so that they [Blount and Mahler] could be brought up to date. Taylor prepared such an outline and sent it in a letter to Mr. Blount dated November 4, 1955. Four or five days later Mr. Taylor telephoned Mr. Blount and was asked by him to come to Detroit because a completely new development had arisen which Blount wanted to discuss with Taylor. Taylor went to Detroit on November 14, 1955. He was told that it had been decided not to go ahead with the Case Cast program because the executives of defendant had decided on a much larger program and were inviting Tradeways and two other organizations to make full-scale presentations on November 22 as how to carry out these objectives for the DeSoto Division.

[2, 3] On November 22, 1955, Mr. Taylor presented the program proposed by Tradeways to a group of defendant's major executives. The program had been recorded on a record which was played to the assembled group and Mr. Nielsen, an officer of the defendant, remarked "This is the finest program we have heard yet." The members of the group began to discuss plans for the program in more con-

crete terms. For several reasons this remark and the discussions that followed cannot operate as an acceptance of plaintiff's offer. One reason is that Mr. Taylor had also discussed the cost to the defendant and had stated two alternative price terms. The first alternative was that one part of the program could be purchased for $130,000 and the other part for between $35,000 and $40,000. The second was that each participating dealer would purchase the program for $180, to be paid at the rate of $15 per month. It is well settled that no contract can be formed if agreement has not been reached on an essential element, and price is certainly such an element. 1 Corbin on Contracts § 97 n. 31 (1963); Boatright v. Steinite Radio Corp., 46 F.2d 385 (10 Cir. 1931); Ansorge v. Kane, 244 N.Y. 395, 398-399, 155 N.E. 683 (1927). Moreover, Chrysler told Mr. Taylor they wanted the proposal in writing. No agreement could bind Chrysler until the parties settled on a written document. 1 Corbin on Contracts § 30 (1963); Ambler v. Whipple, 87 U.S. (20 Wall.) 546, 555-556, 22 L.Ed. 403 (1874); Banking & Trading Corp. v. Floete, 257 F.2d 765, 769 (2 Cir. 1958); Wilmott v. Giarraputo, 5 N.Y. 2d 250, 185 N.Y.S.2d 97, 157 N.E.2d 282 (1959); Michigan Broadcasting Co. v. Shawd, 352 Mich. 453, 90 N.W.2d 451 (1958).

[4] Four or five days after the presentation on November 22, defendant's employee, Mr. Blount, telephoned Mr. Taylor that Tradeways was "selected" but Taylor did not know whether payment alternative No. 1 or No. 2 was accepted, and in any event it is apparent that the telephone conversation was not intended to supersede the requirement that Tradeways' offer be in writing, and therefore it cannot be considered to be the agreement from which Chrysler's obligations are measured.

Following the meeting of November 22 Taylor returned to New York and prepared, after conferring with plain-

tiff's president, Mr. Lough, the letter of November 29. Taylor presented this at defendant's offices on November 30. The last paragraph of the letter stated: "If this letter is a correct statement of our agreement your acceptance thereof will be signified by your signature below." The letter was never signed by defendant. Mr. Mahler told Mr. Taylor he could not sign the letter and suggested numerous changes. Mr. Taylor returned to New York where he and Mr. Lough prepared a second letter incorporating the changes suggested by Mr. Mahler. This letter, dated December 1, 1955, was mailed to defendant. The final statement of the letter reads: "If this letter is a correct statement of our understanding, that understanding will be evidenced by a signature below." This letter also was never signed by defendant.

[5] Taylor's next meeting with representatives of defendant occurred on December 15. He went to defendant's offices to procure a signature to the letter dated December 1. He was told by Mahler that he could not sign the letter without reviewing it with his superiors and with the legal department of defendant. A communicated rejection of an offer causes it to become a nullity, 1 Corbin on Contracts § 94 (1963). But this is true only if the person who rejects the offer had authority to accept it; if he lacked such authority his rejection has no legal significance. Defendant's undisputed evidence proved that Mahler has no authority to accept Tradeways' offer. Nor is there any evidence that Mahler had apparent authority to accept or that plaintiff relied upon his having apparent authority.

On December 23, plaintiff prepared and mailed to defendant's purchasing department its third offer consisting of a letter signed by Taylor which enclosed two copies of an outline of a training program "we are preparing for the DeSoto Division," Exhibit 11. The court's comments are revealing. It was the court's view that "this gentleman [Mr. Taylor] who just finished testifying said in sub-

stance that they hadn't yet arrived at a contract by the end of the year [1955]." The December 23rd offer asked for the issuance of a purchase order. Such order was not issued until March 23, 1956.

[6] From the foregoing narrative of events in their chronological order we are convinced that the parties made no oral contract and that their first written contract was dated March 23, 1956 and was actually received by plaintiff the following May 7.

In his charge to the jury, Judge Murphy stated the contentions of the parties and summarized the evidence with complete fairness. He told the jury it should determine (1) whether an oral contract was made and (2) if an oral contract was proved, whether defendant broke it. If either point 1 or 2 was found against plaintiff, the jury's verdict must be for defendant, but if both points were found in favor of plaintiff, then the jury should award damages. The Foreman of the jury reported its verdict as follows:

"On point 1, we find there was an oral contract.

"2. There was a breach of the oral contract by the defendant.

"3. We award the plaintiff damage to the extent of $108,000."

[7] It is clear beyond dispute that everything Taylor did following the November 22nd meeting was done in an effort to comply with the requirement of a signed contract. Without such a signature there could be no binding contract, cf. 1 Corbin on Contracts § 29 (1963). Permitting the jury to determine whether the parties had entered into an oral contract was an error so serious as to compel reversal.

At the conclusion of plaintiff's evidence and again at the conclusion of all the evidence Chrysler moved for a directed verdict. Denial of this motion is asserted to be an error requiring reversal of the judgment for plaintiff. We hold

that it is, and we direct verdict for defendant.[1] Higgs v. De Maziroff, 263 N. Y. 473, 476-478, 189 N.E. 555, 92 A.L.R. 807 (1934).

[8-10] Alternatively Chrystler asserts that it was error to submit the issue of the existence of the oral contract to the jury because proof of the alleged contract was barred by the statute of frauds. We agree. Judge Murphy ruled on this subject in his opinion dated February 28, 1964. Apparently he thought the New York statute rather than the Michigan statute applicable, but as they are substantially identical it is immaterial.[2] He correctly found that since plaintiff's services were to last for at least one year, and were to commence at a time after the making

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[1] Defendant requested the court to charge that if the jury conclude that it was the intention of the parties to contract with one another in writing then you cannot find they entered into an oral contract. The court declined to give this charge. What the court said is quite inadequate. The charge was erroneous but as errors in the charge would merely result in a new trial such errors are not important in view of our earlier rulings.

[2] New York Personal Property Law, McKinney's Consol. Laws, c. 41, § 31 provides in relevant part:

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, of such agreement, promise or undertaking;
>
> "1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime; * * *"

Mich. Comp. Laws, § 566.132 (1948), Mich. Stat. Ann. § 26.922, provides in relevant part:

> "In the following cases specified in this section, every agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized, that is to say:
>
> "1. Every agreement that, by its terms, is not to be performed in 1 year from the making thereof; * * *"

of the agreement between the parties, the oral agreement was one which was not to be performed within one year. McLaughlin v. Ford Motor Co., 269 F.2d 120, 124-125 (6 Cir. 1959). The court's error is in construing the contract "as one for the sale of special order goods" and that is to be "governed by the provisions of § 85 of the Personal Property Law rather than § 31."[3] Plaintiff's

---

[3] New York Personal Property Law, § 85 provides in relevant part:

"1. A contract to sell or a sale of any goods of the value of five hundred dollars or upward, except where the goods are to be manufactured especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, shall not be enforceable by action unless:

"(a) There is some note or memorandum in writing signed by the party to be charged or his agent in that behalf, sufficient to indicate that a contract to sell or a sale has been made between the parties and showing the quantity of goods sold or contracted to be sold, or

"(b) The buyer has accepted part of the goods and actually received the same, or

"(c) The buyer has given something in part payment. * * *"

Michigan Comp. Laws, § 440.4 (1948), Mich. Stat. Ann. § 19.244, provides in relevant part:

"(1) A contract to sell or a sale of any goods or choses in action of the value of 100 dollars or upwards shall not be enforceable by action, unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged, or his agent in that behalf.

"(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer, and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply. * * *"

business was furnishing professional services. The goods supplied were merely incidental to those services. It could not be reasonably contended that by writing a brief the lawyer's contract is converted into a contract for the sale of goods. Cf. City Title Ins. Co. v. Traub, 116 N.Y.S.2d 35 (App.T.1952). However, it has been held that the requirement of a writing in § 31(1) is applicable whether or not the contract is classified as one for the sale of goods. Lieberman v. Templar Motor Co., 236 N.Y. 139, 146, 140 N.E. 222, 29 A.L.R. 1089 (1923) (Cardozo, J.). The history of the two categories bears out this interpretation, as the "special order goods" exception of § 85 grew out of court holdings that contracts for these goods were not to be classified as contracts for goods at all, but were in fact contracts for "work and labor." See Indiana Limestone Co. of New York v. Harry Bernstein Cut Stone Co., 263 App. Div. 312, 313-314, 32 N.Y.S.2d 956 (1942); Gura v. Herman, 227 App.Div. 452, 455-456, 238 N.Y.S. 230 (1929), aff'd mem., 253 N.Y. 618, 171 N.E. 808 (1930); Bauscher Bros. v. Gies' Estate, 160 Mich. 502, 125 N.W. 420 (1910). Further, this interpretation is in accordance with the well recognized doctrine that the existence of other exceptions to the statute of frauds does not take a contract out of the statute if performance is to continue beyond one year—the one-year rule of § 31(1) is still applicable. 2 Corbin on Contracts § 469 (1950); 3 Williston on Contracts § 501, at 613-615 (3d ed. 1960). Therefore, the statute of frauds would bar the introduction of any evidence relating to the alleged oral agreement of November 22, as there exists no memorandum signed by Chrysler embodying the terms of that agreement.

With regard to the counterclaim, judgment was ordered entered in favor of Chrysler for $12,480.12, which, by Tradeways' admission, was the unpaid balance of a $15,000 advance made by Chrysler to Tradeways under the terms

of the written contract. We find no error with respect to this judgment and accordingly affirm.

Judgment on Tradeways' claim is reversed with instructions to dismiss the complaint. Judgment on Chrysler's counterclaim is affirmed.

WATERMAN, Circuit Judge (concurring):

The court's opinion points out clearly that the result reached is predicated upon analysis of the merits of the parties' oontroversies. Therefore, I wholeheartedly concur therein. Nevertheless, as mention is made that my brothers might have resolved the case by holding that the Chief Judge of the Southern District abused his discretion in denying the defendant's motion to dismiss the case for plaintiff's failure aggressively to prosecute its claim, and courteous mention is also made that I would disagree with such a holding, I respectfully add my bit of dictum to theirs. It is significant that the four cases they cite are affirmances of dismissals by the district judges—none is a reversal of a failure to dismiss. These cases support my approach, which is simply that our appellate tribunal should not interfere with the control by the district courts of their civil dockets unless the circumstances are astonishingly egregious. With that standard in mind I would say that here the action taken by the Chief Judge of the busy Southern District was well within his discretion.

APPENDIX "B"

Opinion No. 29712

[1813-16]

MURPHY, *D. J.*

By its verdict the jury found that defendant, Chrysler Corporation, had breached an oral agreement that existed between it and plaintiff. Damages of $108,000 were awarded.

By motion after verdict Chrysler contends that the oral agreement found by the jury is void by virtue of the statute of frauds. Memoranda have been submitted on this question by both sides. It is agreed that no choice of law need be made since there is no conflict between the Michigan and New York statutes of fraud.

From the testimony adduced at the trial it is fair to state that the essential elements of the agreement found by the jury were these: Tradeways, a sales promotion organization, undertook to provide a "DeSoto Salespower Program" for DeSoto's district managers and retail salesmen. In actuality this obligated Tradeways to prepare or have prepared various written, printed and recorded materials for distribution to DeSoto managers and salesmen. The cost of the program was to be paid by those dealers who subscribed to the program at the rate of $15 per month for twelve months. This twelve-month period was to commence sometime in the future, that is, with respect to the time of the making of the contract late in 1955. Chrysler, through its DeSoto Division, undertook two principal obligations: (1) to use its best efforts to obtain dealer subscriptions and (2) to forward subscription revenues to Tradeways. Since there was no proof offered that Chrysler breached the latter obligation it is fair to state that the jury's finding of a breach is the equivalent of saying that the breach consisted in the failure of Chrysler to use its best efforts to promote the program.

Appendix "B"

As plaintiff points out, the statute of frauds is a technical defense. This is emphasized in a case such as this where a jury has found that a contract did in fact exist between the parties. Since the obvious purpose of the statute is to forestall the perpetration of fraud perhaps we should examine into the possibility and probability of fraud resulting from this jury's verdict.

It is not contended nor would it be consistent for Chrysler to contend that it did not intend to enter into *an* agreement. Rather it takes the position that no agreement other than the written purchase order was in fact entered into. In addition, Chrysler did not dispute the fact that under any contract that might have been reached the plaintiff would be forbidden direct contact with the DeSoto dealers. In other words, Tradeways had no opportunity to promote the program on its own behalf. The success of any contract as far as both Chrysler and Tradeways was concerned depended on the extent of dealer participation in the program. Under such circumstances any contract that might have been reached must of necessity have contained some promise on the part of Chrysler to sell the program, otherwise it could be said that Chrysler undertook nothing under the agreement. To contend this would, in our opinion, come close to a perpetration of a fraud on the plaintiff. This would leave only the nature of the promise uncertain, but here again it would appear that unless it at least embraced such language as "reasonable efforts" or "best efforts to sell the program" it would be illusory.

From this it would appear that the chance of this jury's verdict perpetrating a fraud on the defendant is slim.

Such a finding, of course, does not suspend the operation of the statute of frauds in a case that is clearly within it. Linked with the other facts of this case (especially the nature of the contract), however, it creates a strong reason

to look beyond the letter of the statute. Cf. Farmer v. American Arabian Oil Co., 277 F. 2d 46 (2d Cir., 1960) where the court said "that the statute of frauds as applied to . . . a contract . . . where plaintiff has performed for many months is an anachronism in modern life and we are not disposed to expand its destructive force." Id. at p. 51.

It would be inadequate to characterize this contract merely as one not to be performed within a year. While it does in fact appear to be such we must also agree with plaintiff that it very closely resembles a contract to sell specially made goods in that the materials prepared by Tradeways were geared for use by defendant only, and not suitable for sale to others. Giving practical effect to the nature of the contract we construe it as one for the sale of special order goods and find it to be governed by the provisions of § 85 of the Personal Property Law rather than § 31. Section 85 is the sales statute of frauds and it specifically excepts from its provisions goods manufactured especially for the buyer and not suitable for sale to others.

Accordingly, defendant's motion to set aside the verdict is denied and judgment should be entered on the jury's verdict.

This is an order. No settlement is necessary.

THOMAS F. MURPHY
Thomas F. Murphy
U. S. D. J.

Dated, New York, N. Y., February 28, 1964.

Appendix "B"

Opinion No. 29815

* * *

[1956-57] MURPHY, *D. J.*

The post-trial motion of Chrysler Corporation pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure is denied. While the evidence may not have been overwhelming, it was sufficient to present issues of fact for the jury. Accordingly, the weight given that evidence was for the jury to decide.

Chrysler's motion to reargue the statute of frauds question is granted and upon reargument our prior decision is adhered to. It was slightly inaccurate to unqualifiedly assert that Perrin v. Pearlstein, 314 F. 2d 863 (2d Cir., 1963) overruled Farmer v. American Arabian Oil Co., 277 F. 2d 46 (2d Cir., 1960). Only so much of *Farmer* was overruled as gave effect to certain dicta found in New York decisions on the issue of whether or not the particular contract there involved came within the "not to be performed within one year" provision of § 31 of New York's Personal Property Law.

Farmer is still authority (for us, at least) for the proposition that the destructive force of the statute of frauds shall not be expended beyond its literal terms.

On the question of interest we are satisfied that the law of Michigan is applicable. There is little doubt also, that under Michigan law plaintiff's claim would have been labeled "unliquidated." This being so, Tradeways is entitled to interest on its verdict only from the date thereof. Chrysler's counterclaim, on the other hand, is a prime example of a liquidated claim and thus interest on its judgment from February 26, 1958, should be added.

These are orders. No settlements are necessary.

s/ THOS. F. MURPHY
U. S. D. J.

Dated, New York, N. Y., April 1, 1964.

APPENDIX "C"

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRTUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of March, one thousand nine hundred and sixty-five.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. THOMAS W. SWAN,
HON. STERRY R. WATERMAN,
Circuit Judges.

TRADEWAYS, INCORPORATED,
Plaintiff-Appellant,

v.

CHRYSLER CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court as to the claim of appellant Tradeways Inc., be and it hereby is reversed but as to judgment on the counterclaim in favor of appellant Chrysler Corporation, said judgment be and it hereby is affirmed in accordance with the opinion of this court with costs to the appellant Chrysler Corporation.

A. DANIEL FUSARO,
Clerk.

APPENDIX "D"

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of March, one thousand nine hundred and sixty-five.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. THOMAS W. SWAN,
HON. STERRY R. WATERMAN,
Circuit Judges.

TRADEWAYS, INCORPORATED,

Plaintiff-Appellant,

v.

CHRYSLER CORPORATION,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

Appendix "D"

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of March, one thousand nine hundred and sixty-five.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. THOMAS W. SWAN,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL,
HON. ROBERT P. ANDERSON,
Circuit Judges.

TRADEWAYS, INCORPORATED,
Plaintiff-Appellant,

v.

CHRYSLER CORPORATION,
Defendant-Appellant.

A petition for a rehearing in banc having been filed herein by counsel for the plaintiff-appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

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IN THE

Supreme Court of the United States

October Term : 1965

No. 304

TRADEWAYS, INCORPORATED,

Petitioner,

vs.

CHRYSLER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

FRANCIS S. BENSEL
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IN THE

Supreme Court of the United States

October Term : 1965

No. 304

TRADEWAYS, INCORPORATED,

Petitioner,

vs.

CHRYSLER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Respondent Chrysler Corporation hereby submits its Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed herein on June 28, 1965.

Opinions Below

The opinion of the Court of Appeals is reported at 342 F.2d 350-56 (2d Cir. 1965) and is included in Petitioner's Appendix (PX 12-23)*. Two of the

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* References herein to pages of Petitioner's Appendix to its Petition for Writ of Certiorari will be preceded by the abbreviation "PX " and references to the Appendix annexed hereto will be preceded by the abbreviation "RX". Similar references to Petitioner's and Respondent's Appendices in the Court of Appeals will be preceded by the abbreviations "PA" and "RA" respectively and references to the Record in the Court of Appeals will be preceded by the abbreviation "R".

OPPOSITION BRIEF

three opinions of the District Court are included in Petitioner's Appendix (PX 24-27). The opinion of Chief Judge Ryan is not. Accordingly, the opinion of Chief Judge Ryan dated December 19, 1963 is printed in Respondent's Appendix (RX 14).

Questions Presented

1. In a diversity suit for breach of contract does the application of controlling state law to uncontested facts resulting in a judgment notwithstanding a verdict in accordance with Fed. R. Civ. P. 50(b) deny Petitioner a constitutional right to a jury trial under the Seventh Amendment?

2. Is the dismissal for failure to prosecute pursuant to Fed. R. Civ. P. 41(b) after notice and hearing in consequence of Petitioner's 5½ years delay prejudicing Respondent's ability to defend a denial of due process to Petitioner in violation of the Fifth Amendment?

3. In a contract dispute between two commercially sophisticated corporations which the Court of Appeals unanimously held was controlled by basic principles of state law should the Supreme Court of the United States grant certiorari to determine spurious, afterthought "constitutional" claims not heretofore asserted in any court below?

Statement of the Case

Petitioner (Tradeways, Incorporated) is a New York corporation engaged since 1915 in the business of rendering sales promotional services to many of America's largest corporations. Respondent (Chrysler Corporation) is a Delaware corporation which utilizes such services. On October 18, 1958 Petitioner sued Respondent for breach of contract in the Southern District of New York. Jurisdiction was based on diversity of citizenship.

Petitioner in the pre-trial order and at trial proceeded on the theory of an express bi-lateral "oral contract" allegedly made on November 22, 1955 (RA 33-39). Respondent's answer denied the alleged contract but admitted the making of an integrated written contract in early 1956 covering the same subject matter as the prior "oral contract" (RA 1, 29-31). There has never been any question that Respondent fully performed all of the terms of the written contract until Petitioner's admitted breach and unilateral discontinuance of performance. Petitioner however contended that its prior "oral contract" had more onerous terms. Petitioner's contention of a prior "oral contract" raised questions as to the authority of the particular employees of Respondent participating in oral negotiations; the application of the Parol Evidence Rule; the defense of the Statute of Frauds; the existence of any breach of the "oral contract" by Respondent and Petitioner's own failure to perform its alleged "oral contract"; and the right to damages where Petitioner admitted its "oral contract" would have been a financially losing contract even if fully performed.

On appeal to the Second Circuit all three judges unanimously agreed that application of controlling principles of state contract law to Petitioner's own evidence entitled Respondent to judgment dismissing the complaint. There is no conflict with the decisions of the state courts. In fact Petitioner characterized Respondent's legal arguments on appeal and the cases supporting its arguments as "little more than hornbook law" (Plaintiff-Appellee-Appellant's Brief, p. 2). As an alternative ground, two of the judges (Chief Judge Lumbard and Judge Swan) also agreed that Petitioner's case should have been dismissed for failure to prosecute for 5½ years resulting in serious prejudice to Respondent's ability to present evidence in its defense because of the death in an airplane accident in May, 1962, of Welch (Respondents key witness responsible for the contract). Respondent also showed other prejudice through the loss of records and employees familiar with the dealings between the parties (RA 338-339).

Prior to Welch's death, Petitioner did nothing to prosecute its suit save gratuitously to amend its complaint four times without right or leave of court (RA 333-335). During this period Petitioner's action was twice dismissed for failure to prosecute (RA 334-335). Sixteen months after the second dismissal Judge Ryan vacated this dismissal writing:

> "The record does not disclose diligent prosecution of this suit; now, after almost 3½ years, the suit is not at issue [Petitioner had not served a reply to Respondent's counterclaim which remained unanswered at the trial]. *For the last time, the order of dismissal is vacated*; the time to complete dis-

covery [Respondent had completed its discovery 25 months earlier] and place this suit on a trial calendar is extended *to July 25, 1962; no further extensions will be granted*; so ordered." (Italics added) (RA 334).

After Welch's death Petitioner filed a Note of Issue and a *purported* Statement of Readiness on June 25, 1962. Four and one-half years after commencing its suit, and a year after filing its Statement of Readiness, Petitioner moved to stay the action to take the deposition of a witness whose connection with this suit was known to Petitioner prior to its commencement (RA 335-338). Petitioner attempted to excuse it prejudicial delay and explain the omission of this witness from its list of witnesses in the pre-trial order by asserting the illness of one of its counsel. Respondent later discovered that Petitioner's counsel was actively trying cases in the state courts during the claimed period of "incapacitation" and, in fact, had personally visited this witness at his home in Michigan more than a month before the pre-trial order was filed (R. 1467). Thereafter on October 17, 1963, and again on November 1, 1963, Petitioner twice refused to go to trial and persisted in attempting to evade orders of the court (RA 336-338).

Respondent moved under Rule 41(b) to dismiss Petitioner's suit for failure to prosecute, disregard of the court's rules, failure to comply with court orders, and severe intervening prejudice to respondent. Both parties submitted affidavits and memoranda of law and the court heard oral argument. Judge Ryan neither granted nor denied Respondent's motion but

allowed Petitioner a further continuance to go to trial writing:

> "For the fourth and last time, the suit is set down for trial pre-emptorily against plaintiff for January 4, 1964. Upon plaintiff's failure to proceed to trial at that time, this suit will be dismissed and judgment will be entered in favor of defendant on its counterclaim. . . .
>
> "The record in this case (over 5 years old) shows that the Court had been extraordinarily considerate and lenient to plaintiff's counsel. Perhaps, too much so. Its patience is now exhausted. In all fairness to defendant and the other litigants in the Court, this suit must be disposed of." (RX 14).

Fairness to Respondent had long since passed.

At trial, the *entire* evidence on the subject of the making and the terms of Petitioner's prior "oral contract" was offered by Petitioner. Respondent's proof was limited to: (a) introduction of the written contract; (b) performance of the terms thereof; and (c) the lack of "actual" authority of its employees with whom Petitioner negotiated. Petitioner's own evidence also showed lack of any apparent authority of these employees.

Based *exclusively* on the testimony of Petitioner's own witnesses and documentary evidence Respondent requested a directed verdict and dismissal of the complaint on six principles of contract law, to wit:

1. Petitioner's testimony established that no "oral contract" ever came into existence between

the parties under contract principles of "offer and acceptance" (*Defendant-Appellant's Brief* p. 19-29, 74-76, 79-81);

2. Petitioner's testimony and its own exhibits established that both parties intended a written contract as a condition precedent to contractual obligation (*Defendant-Appellant's Brief* p. 29-37, 76);

3. Petitioner's testimony on the subject of authority established that it knew that none of the employees with whom it allegedly negotiated its "oral contract" had any authority to bind Respondent to contractual obligation (*Defendant-Appellant's Brief* p. 40-48, 78-79);

4. There was in evidence a fully integrated written contract between the parties covering the same but materially less onerous terms and conditions as Petitioner's prior "oral contract". The Parol Evidence Rule therefore precluded Petitioner from proving a prior "oral contract" varying and directly contradicting the terms of the written integration between the parties (*Defendant-Appellant's Brief p.* 40-48, 78-79);*

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* It should be noted that Petitioner's contention (*Petition* p. 7-8) heretofore considered and rejected by the Second Circuit that the jury should be permitted to receive all of the testimony of an "oral contract" and the documents constituting the "written contract" of the parties and pick and choose inconsistent terms between them is untenable. The existence and meaning of a written contract is for the court not the jury (See *Defendant-Appellant's Brief* p. 78-79; *Defendant-Appellant's Reply Brief* p. 13-14). Moreover, the doctrine of partial integration has no application to this case for several reasons: (a) The written contract was complete on its face as to all essential terms and purported to contain the entire agreement of the parties. This raises a conclusive presumption of integration. In fact Petitioner

5. Petitioner's testimony established that its "oral contract" was to commence *in futuro* of the date of the alleged making thereof and by its terms was incapable of performance within one year of the actual commencement of performance. As there was no note or memorandum in writing signed by Respondent evidencing Petitioner's "oral contract" it was void under the Statute of Frauds (*Defendant-Appellant's Brief* p. 49-59*);

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admitted the written contract contained the "complete" contract of the parties; (b) the doctrine of "partial integration" has no application where the purported parol "term" is covered or dealt with in the written integration. Petitioner's own witnesses admitted that its alleged "oral contract" covered the same (but varying and contradicting) terms as the written contract; and (c) The doctrine of partial integration may not be used to vary or contradict the express terms of the written contract which is precisely what Petitioner attempted to do at trial (See *Defendant-Appellant's Brief* p. 42-48).

* It should be noted that Petitioner's several theories below to satisfy the Statute were rejected by the Second Circuit. Petitioner's suggestion (Petitioner's p. 10-11) urged for the first time in its petition for rehearing en banc and repeated here that the "written contract" between the parties constituted a signed memorandum in satisfaction of the Statute of Frauds in respect to its "oral contract" is legally untenable. Petitioner's alleged "oral contract" contained material terms and conditions, i.e., a "best efforts" obligations, a "guarantee of 1,000 dealer subscriptions", etc. (See *Defendant-Appellant's Reply Brief* p. 2-4) nowhere found in any writing subscribed to by Respondent. Where a term is contended by a party to constitute a material part of its "oral contract" and that term is not included in the writing offered to satisfy the Statute of Frauds the writing is necessarily insufficient as a matter of law. (See *Defendant-Appellant's Brief* p. 58-59). To *now* suggest that the "essence" of the "oral contract" was the terms of the "written contract" is a repudiation of Petitioner's entire theory of suit below. The very reason Petitioner elected to sue on the theory of a prior "oral contract" containing enlarged terms is because there was no question as to Respondent's full performance (in fact over-performance) of the terms of the written contract. To re-try the case *de novo* under the terms of the written contract on a petition for writ of certiorari misconceives the purpose for which this Court sits.

6. By Petitioner's own admission the alleged "oral contract" was a financially "losing" contract and had it been performed Petitioner would have lost more money than the claimed damages it did make out (*Defendant-Appellant's Brief* p. 69-73, 81-83; While this issue was not reached by the Second Circuit it makes the instant petition for certiorari academic).

Nevertheless, the trial judge submitted the case to the jury on Petitioner's theory of prior "oral contract." The verdict was based on evidence erroneously admitted over Respondent's objection on the ground of the Parol Evidence Rule and on erroneous instructions on matters of law by the trial court.* For example, the trial judge failed to charge as to the effect of an intention to contract in writing and did not so much as refer to the necessity of any finding of authority (actual or apparent) by the employees with whom Petitioner negotiated (RA 10-28). While these errors alone would merely have resulted in a new trial, they do show that the jury's verdict was necessarily in error. This fact alone distinguishes the cases relied upon in the Petition p. 7.

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* Respondent asserted six reversible errors in the trial court's charge, four of which were not seriously contested by Petitioner (*Defendant-Appellant's Brief* p. 74-84; *Defendant-Appellant's Reply Brief* p. 24-26).

ARGUMENT

I

This Court has repeatedly stated its disapproval of the practice of attempting *de novo* review under the ruse of raising spurious "constitutional" issues. Taft, *The Jurisdiction Of The Supreme Court Under the Act of February 13, 1925,* 35 Yale L.J. 1, 2-3 (1925). See also statements of Chief Justices Hughes and Vinson reprinted in Stern & Gressman, *Supreme Court Practice* 119-20 (1962). Petitioner contends as a "constitutional" issue that it was denied a jury trial in consequence of the Second Circuit's judgment notwithstanding the verdict (Petition p. 7-8). In support of this argument it cites cases dealing with the question of whether a particular type of action is one at law or in equity,* whether the federal district courts of Louisiana must conform their procedural practice to that of the State of Louisiana under the Judiciary Act of 1824,** and whether an appellate court can set aside a jury's answers to special interrogatories where there is reasonable grounds to support such determinations.***

It is long settled that where there is no evidence or where reasonable men cannot differ as to the evidence, the direction of a verdict or the granting of judgment notwithstanding the verdict pursuant to Fed. R. Civ.

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* *Beacon Theatres* v. *Westover,* 359 U.S. 500 (1959).

** *Parsons* v. *Bedford,* 27 U.S. (3 Pet.) 433 (1830).

*** *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.,* 369 U.S. 355 (1962).

P. 50(a) & (b) is not an unconstitutional denial of the right to a jury trial under the Seventh Amendment. E.g., *Galloway* v. *United States,* 319 U.S. 372, 388-96 (1942); *Manaia* v. *Potomac Elec. Power Co.,* 268 F.2d 793, 798-99 (4th Cir. 1959), cert. denied, 361 U.S. 913 (1959); *Smith* v *Reinauer Oil Transport, Inc.,* 256 F.2d 646, 649 (1st Cir. 1958), cert. denied, 358 U.S. 889 (1958) (per Magruder, C.J.); *Cox* v. *City of Freeman,* 321 F.2d 887, 891 (8th Cir. 1963). See also *Houston Oil Co.* v. *Goodrich,* 245 U.S. 440, 441 (1918). Cf. *National Labor Relations Bd.* v. *Pittsburgh Steamship Co.,* 340 U.S. 498, 502-03 (1951). The instant case is more compelling in that here it was *solely* a matter of applying principles of law to *uncontested* facts. It was therefore the affirmative duty of the court to direct a verdict for Respondent. See *Defendant-Appellant's Brief* p. 19, 36-37. The instant case could not have been a denial of a jury trial in that the jury is the arbiter only of the facts, as to which there was no dispute. It is not the arbiter of the law which was in dispute and which was resolved in Respondent's favor by the Second Circuit Court of Appeals.

Petitioner next contends as a "constitutional" issue that it was denied due process in consequence of a dismissal for failure to prosecute citing no supportive authority whatever (Petition p. 9-10). Due process of law means notice and opportunity for a hearing. Petitioner having submitted briefs and orally argued the motion was certainly accorded due process. It has in fact been held that involuntary dismissal does not constitute a denial of due process within the meaning of the Fifth Amendment without notice and hearing. *Shotkin* v. *Westinghouse Elec. & Mfg. Co.,* 169 F. 2d

825, 826 (10th Cir. 1948). A fortiori the dismissal for failure to prosecute pursuant to Fed. R. Civ. P. 51(b) with notice and hearing was clearly not a denial of due process. *Link* v. *Wabash Ry.*, 370 U.S. 626, 632 (1961); *Nasser* v. *Isthmian Lines*, 331 F. 2d 124, 128-29 (2d Cir. 1964); *Engelhardt* v. *Bell & Howell Co.*, 299 F. 2d 480, 485 (8th Cir. 1962). Cf. *Hammond Packing Co.* v. *State*, 212 U.S. 332, 350-52 (1909).

II

This Court has repeatedly stated that it does not sit for the "benefit of particular litigants" or to determine academic "federal questions" unnecessary to the disposition of a case. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 73-74 (1955). The Second Circuit Court of Appeals expressly considered the several contract questions stated supra and by way of alternative holding unanimously dismissed the complaint following controlling principles of state contract law. 342 F.2d 351-56. This Court has stated that it will "accept the determinations of the Court of Appeals on questions of local law." *General Box Co.* v. *United States*, 351 U.S. 159, 165 (1955). Stern & Gressman, *Supreme Court Practice* §4.9, at 134-35 (1962). Determination of the purported "constitutional" issues stated in the Petition is therefore wholly academic and unnecessary to the disposition of this case. It is moreover contrary to this Court's stated policy of not determining a "constitutional" issue in the presence of an adequate non-federal ground controlling the determination. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1935); *Herb* v. *Pitcairn*, 324 U.S. 117, 128 (1945); *Wolfe* v. *North Carolina*, 364 U.S. 177, 196

(1959). Moreover, none of the after-thought "constitutional" issues were asserted or even mentioned below. Nor were they mentioned in Petitioner's petition for rehearing en banc. This Court has repeatedly stated that issues asserted for the first time in a petition for writ of certiorari do not commend themselves to its attention. *McCullough* v. *Kramerer Corp.*, 323 U.S. 327, 328 (1945); *Ellis* v. *Dixon*, 349 U.S. 458, 460 (1959).

Conclusion

The instant Petition presents no genuine "constitutional" issues and no conflicting or important question of law. It is an obvious attempt by a losing litigant (a sophisticated corporate enterprise) to attain a further review by this Court of an ordinary commercial dispute which it stated below involved "little more than hornbook law."

Respondent respectfully submits that a writ of certiorari in this case can serve no useful purpose and should be denied.

Respectfully submitted,

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APPENDIX

Opinion of Judge Ryan Dated December 19, 1963

* * * *

[1486] For the fourth and last time, this suit is set down for trial pre-emptorily against plaintiff for January 4, 1964. Upon plaintiff's failure to proceed to trial at that time, this suit will be dismissed and judgment will be entered in favor of defendant in its counterclaim. Upon plaintiff's failure to proceed as above, an order to that effect by defendant may be submitted ex parte at that time.

No further motions or applications are to be made by plaintiff between now and then. The record in this case (over five years old) shows that the Court has been extraordinarily considerate and lenient to plaintiff's counsel. Perhaps, too much so. Its patience is now exhausted. In all fairness to defendant and the other litigants in the Court, this suit must be disposed of.

So Ordered.

Dated: December 19, 1963

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